UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

APRIL COULOUTE,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:01cv1823 (PCD)
	:	
MERCURY MORTGAGE INC., *et al.*,	:	
Defendants.	:	

RULING ON DEFENDANTS' MOTION TO DISMISS

Defendants move pursuant to FED. R. CIV. P. 12(b)(5) and 12(b)(6) to dismiss plaintiff's complaint arguing that plaintiff failed to effect proper service, fails to allege a cognizable constitutional violation, and pursues claims barred by res judicata and collateral estoppel. For the reasons set forth herein, defendants' motion to dismiss is granted.

I. BACKGROUND

Plaintiff alleges the following. She is the owner of a house on which defendant Mercury Mortgage, Inc. ("Mercury") held a mortgage and a promissory note. Plaintiff defaulted on the note as a consequence of defendant Mercury's lending practices. Defendant Hunt, Chester, Leibert & Jacobson, P.C. ("Hunt") represented Mercury in foreclosure proceedings in Connecticut state trial and appellate court in which Mercury ultimately prevailed.

On September 24, 2001, plaintiff filed a two-count complaint alleging that defendants violated her rights under the First and Fourteenth Amendments through their conduct in pursuing a foreclosure in Connecticut state courts. On October 25, 2001, defendants served plaintiff with a motion to dismiss the complaint. On November 16, 2001, plaintiff filed an objection to defendants' motion to dismiss.

On November 19, 2001, the objection was returned for failure to attach a certificate of service to the pleading.[1] On December 5, 2001, the defendants' motion to dismiss was filed pursuant to this Court's Supplemental Order along with defendants' certification that the twenty-one day period for objection had lapsed. On December 7, 2001, while defendant's motion to dismiss was *sub judice*, plaintiff filed a two-count amended complaint alleging violations of 42 U.S.C. § 1983 and various state law claims.[2]

II. DISCUSSION

Construing plaintiff's complaint under the liberal standard afforded pro se submissions, *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), plaintiff alleges that defendants violated 42 U.S.C. § 1983 by denying her due process and equal protection of the law in foreclosing on a mortgage held on her home, engaged in common law fraud, violated Connecticut's Unfair Trade Practices Act, CONN. GEN. STAT. § 42-110a *et seq*., breached a contract with plaintiff and breached an implied covenant of good faith and fair dealing owed to plaintiff. Defendants move to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(5) and 12(b)(6) arguing that plaintiff failed to effect proper service, fails to allege a constitutional violation by defendants and pursues claims barred

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1 Under D. CONN. L. CIV. R. 9(a) failure to submit a memorandum in opposition to a motion within twenty-one days "may be deemed sufficient cause to grant the motion." In light of plaintiff's *pro se* status and apparent good faith effort to comply with filing procedures, the memorandum in opposition will be construed as timely filed on November 16, 2001 notwithstanding the technical noncompliance which resulted in the order rejecting the submission.

2 Plaintiff is entitled as a matter of right to amend her complaint prior to the filing of a responsive pleading. FED. R. CIV. P. 15(a). A motion to dismiss is not a responsive pleading, *Barbara v New York Stock Exchange, Inc.*, 99 F.3d 49, 56 (2d Cir. 1996), and defendants have not filed an answer, thus plaintiff's amended complaint must be accepted. "[A]n amended complaint ordinarily supersedes the original, and renders it of no legal effect." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) (internal quotation marks omitted). The amended complaint is therefore the relevant complaint and the motion to dismiss is construed as a motion to dismiss the amended complaint.

by res judicata and collateral estoppel.

A. Motion to Dismiss Standard

A motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All facts in the complaint are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

B. Improper Service of Process

Defendants argue that all claims against Mercury should be dismissed for failure to effect proper service. Pursuant to FED. R. CIV. P. 4(m), plaintiff has 120 days from the date on which she filed her original complaint, in the present case September 24, 2001, to effect proper service. A motion to dismiss filed within the relevant time period affords plaintiff the opportunity to cure any defects in service of process, *see Flory v. United States*, 79 F.3d 24, 25 (5th Cir. 1996). Plaintiff therefore has until the expiration of the 120 day period to effect proper service on all defendants if she has not done so at this time.

C. 42 U.S.C. § 1983 Claims

Defendants argue that plaintiff has failed to establish that they acted "under color of state law" as required by 42 U.S.C. § 1983. Plaintiff asserts that she has sufficiently addressed this concern in her complaint.

A claim under § 1983 consists of two essential elements. First, the plaintiff must show that the defendant acted "under color of state law." *Annis v. Westchester*, 136 F.3d 239, 245 (2d Cir. 1998). Next, the plaintiff must show that, as a result of the defendant's actions, a federal statutory or constitutional right was denied. *Id.*

The failure to allege either element sufficiently is fatal to the claim. *See id.* The analysis thus need not reach the alleged constitutional violations if the plaintiff fails to plead an act chargeable to the state,[3] *see Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir.), *cert. denied*, 425 U.S. 974, 96 S. Ct. 2173, 48 L. Ed. 2d 798 (1976). A defendant acts "under color of state law" for purposes of § 1983 when exercising "power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir. 2000) (internal quotation marks omitted), or "has acted together with or has obtained significant aid from state officials or because his conduct is otherwise chargeable to the state," *Barrett v. Harwood*, 189 F.3d 297, 304 (2d Cir. 1999) (internal quotation marks omitted). "[A] private party's mere invocation of state legal procedures [does not] constitute[] 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n.21, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982) (internal

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[3] It is, however, noted that failure to establish that the defendant acted under color of state law would create similar deficiencies in establishing the state action required for a violation of the fourteenth amendment to the United States constitution, *see Barrett v. Harwood*, 189 F.3d 297, 301 (2d Cir. 1999) (comparing "under color of state law" and "state action" in constitutional analysis), as alleged in the present case. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1201 (5th Cir. 1982) ("The Supreme Court has characterized the private use of state legal procedures for purposes of the Fourteenth Amendment as attributable to the state only in situations where the state has created a system which allows state officials to attach property on ex parte application."); *Birbeck v. S. New Eng. Prod. Credit Ass'n*, 606 F. Supp. 1030, 1044 (D. Conn. 1985) ("no state action is involved when a state merely opens its tribunals to private litigants").

quotation marks omitted).

Here plaintiff alleges only that defendants used the state courts as a forum for consummating their ownership of her land. Other than citing unfavorable rulings in the state courts, plaintiff does not allege that the courts somehow empowered defendants to deprive her of her rights, or that the courts worked in concert with defendants toward that end. *See id.* Nor can it be said that defendants are "clothed with the authority of state law" by filing a complaint in state court and receiving a judgment favorable to them in that forum. *See Kia P. v. McIntyre*, 235 F.3d 749, 755 (2d Cir. 2000). Thus, plaintiff's complaint focuses exclusively on the wrongful practices of the private defendants in attempting to foreclose on her property and causing her injury in doing so, and fails to allege the special relationship requisite to establishing that defendants acted under color of state law. "Section 1983 . . . preserves constitutional rights from infringement by persons who act under federal or state authority, not private citizens who commit wrongful acts, however wilful and malicious they may be." *Spampinato v. M. Breger & Co.*, 270 F.2d 46, 49 (2d Cir. 1959). The claims alleging violations of 42 U.S.C. § 1983 are thus dismissed.

D. Connecticut State Law Claims

Plaintiff also alleges a number of violations of Connecticut state law. It is unclear whether these violations are intended to provide a basis for the § 1983 claims or are intended to be claims in and of themselves. If the additional violations are intended to buttress the § 1983 claims, they do not cure the failure to allege that defendants acted under color of state law. If, however, the references to state law are intended as separate bases for claim, then plaintiff and defendant Hunt, both citizens of Connecticut, do not possess the diversity of citizenship required to assert subject matter jurisdiction over those claims

pursuant to 28 U.S.C. § 1332, *see Curley v. Brignoli, Curley & Roberts Assocs*., 915 F.2d 81, 84 (2d Cir. 1990). Defendant's motion to dismiss the complaint is thus granted.

III. CONCLUSION

Defendant's motion to dismiss (No. 11) is **granted**. The complaint is dismissed without prejudice and with leave to file an amended complaint within thirty days.

SO ORDERED.

Dated at New Haven, Connecticut, December ___, 2001.

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Peter C. Dorsey
United States District Judge